

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 14, 2009 Session

KAY F. FRITZ v. CVS CORPORATION d/B/A CVS PHARMACY, INC.

**Appeal from the Circuit Court for Hamilton County
No. 02-C-285 Jeffrey Hollingsworth, Judge**

No. E2008-01256-COA-R3-CV - FILED SEPTEMBER 23, 2009

This action was filed by Kay F. Fritz (“Plaintiff”) alleging that CVS Corporation d/b/a CVS Pharmacy, Inc. (“Defendant”) negligently filled a prescription by giving her the wrong medication, resulting in physical and disabling injuries. Although Plaintiff has been represented by counsel at various times during this lawsuit, she has proceeded pro se since December 2006. At a pre-trial conference the day before trial, the Trial Court continued the matter because the Trial Court discovered that Plaintiff did not have the necessary medical proof and would have lost at trial. The Trial Court ordered the Plaintiff to secure the services of an attorney and gave her one week to do so. After Plaintiff did not retain an attorney, the Trial Court *sua sponte* entered an order involuntarily dismissing this action without prejudice. Plaintiff appeals. We conclude that the Trial Court erred when it involuntarily dismissed this action. We vacate the involuntary dismissal and remand the case for further proceedings consistent with this Opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Circuit Court Vacated; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and JOHN W. McCLARTY, J., joined.

Kay F. Fritz, pro se Appellant.

G. Michael Luhowiak and Jennifer L. Kent, Chattanooga, Tennessee, for the Appellee CVS Corporation d/b/a CVS Pharmacy, Inc.

OPINION

Background

Plaintiff filed suit on January 30, 2002, claiming Defendant¹ had negligently filled a prescription with the wrong medication. Plaintiff claimed she had been prescribed “vicadin” but was given “trazondone” and clonazepam instead. Plaintiff claimed she was unaware that she had been given the wrong medication, that she took the medicine that had been given to her, and that she had an adverse reaction. Plaintiff also claimed:

As a direct and proximate result of the ingestion of the wrong medicine, plaintiff suffered serious personal injuries, illnesses, and disabilities. These problems persisted during the time plaintiff took the wrong medicine, and many of these difficulties are still present and are permanent in nature.

As a result of the physical ailments which appeared after plaintiff commenced taking the medicine, plaintiff became nervous and suffered great mental and emotional anguish. This caused plaintiff’s mental state to deteriorate and plaintiff became physically ill, nauseous, despondent, and depressed. Plaintiff’s home life and marital relationship degenerated and became unhappy.

As a direct and proximate result of the above injuries, plaintiff has incurred additional medical treatment and sustained medical bills and will probably incur more medical bills in the future. (original paragraph numbering omitted)

Defendant responded to the complaint, and while Defendant admitted that Plaintiff had presented to Defendant a prescription for vicodin, Defendant lacked knowledge as to what was given to Plaintiff. Defendant denied the remaining pertinent allegations contained within the complaint.

In March of 2003, the Trial Court entered an order allowing Plaintiff’s attorney to withdraw from the case. Two months later, a new attorney entered an appearance on Plaintiff’s behalf. Plaintiff discharged her second attorney on December 18, 2006, and has proceeded pro se since that time.

¹ Plaintiff sued CVS Corporation d/b/a CVS Pharmacy, Inc. The answer was filed on behalf of Revco Discount Drug Centers, Inc. Revco claimed Plaintiff improperly pled CVS as a party defendant. The record is unclear as to the relationship, if any, between these two entities. The Appellee’s brief on appeal states that it is the “Brief of Appellee CVS Corporation d/b/a CVS Pharmacy, Inc.” Because neither party raises an issue on appeal as to the proper identity of the defendant, for purposes of this appeal only we will assume CVS Corporation d/b/a CVS Pharmacy, Inc. is the proper defendant as that entity filed a brief.

The parties undertook discovery, and the case was set for trial starting on April 17, 2008, with a pre-trial conference set for April 16. According to the Trial Court's order dated May 5, 2008, the following events took place:

This matter was previously set for trial on April 17, 2008. The parties met in chambers for a pre-trial conference on April 16, 2008, at which time it appeared to the Court that the Plaintiff was not prepared to present evidence at trial, the Court cancelled the trial, advised the Plaintiff to obtain the assistance of an attorney, and required the Plaintiff to have said attorney contact counsel for the Defendant no later than April 24, 2008. The Court explained that failure by the Plaintiff to do so would result in having the Plaintiff's case dismissed without prejudice, allowing her up to one (1) year from entry of said Order to re-file her case. The alternative of going ahead with trial as scheduled was explained to the Plaintiff and would have been unfair to Plaintiff as it was obvious to this Court that based upon conversations with the Plaintiff that she did not have medical proof to sustain her case and proceeding would have resulted in a dismissal with prejudice. Plaintiff had an attorney contact Defendant's counsel within the time allowed under this Court's Order of April 16, 2008, but the Plaintiff did not retain the services of said attorney and no attorney has entered an appearance for the Plaintiff. Plaintiff did fax Defendant's counsel a proposed contract with International Legal Services Inc., a copy of which is attached hereto as Exhibit 1, demonstrating that she was attempting to retain counsel. . . . Plaintiff indicates that Tony Davis is an attorney licensed to practice in Tennessee and that he has another case in this court. Counsel for the Defendant has searched for and was unable to find record of Tony Davis' licensure with the Board of Professional Responsibility and Mr. Davis has not entered an appearance for the Plaintiff in this case. Based on these facts, the record in this case and statements of the Plaintiff and counsel for the Defendant, and the findings herein, it is hereby . . .

ORDERED, ADJUDGED and DECREED that this case shall be dismissed without prejudice, thus allowing the Plaintiff up to one (1) year from the date of entry of this Order to re-file her case against the Defendant. Court costs are taxed to the Plaintiff.

Plaintiff appeals the dismissal of her lawsuit. Unfortunately, the "Statement of the Issue Presented For Review" is extremely difficult to understand and is as follows:

Where the Circuit Court during the years of appellant Has listed some of the appellant-plaintiff trial court records Attached, appellant-plaintiff is an disabled nurse - layperson Has lack of

Knowledge of court proceeding during the years Appellant-plaintiff gave trust in the hands of legal counsel According to records that are presented to this Court.

Unfortunately, this statement of the issue does not set forth a reviewable issue. In its brief on appeal, Defendant states that while it cannot glean the issue being raised by Plaintiff in her brief, Defendant “believes” that the issue raised is whether the Trial Court properly dismissed Plaintiff’s case without prejudice. We will go with that.²

Defendant argues that the Trial Court validly used its discretionary authority when it involuntarily dismissed this case without prejudice, and asks this Court to affirm the Trial Court’s judgment.

Discussion

There is no evidence in the record that Plaintiff ever requested a voluntary dismissal without prejudice pursuant to Tenn. R. Civ. P. 41.01. This conclusion is strongly reinforced by the fact that Plaintiff is the party who has appealed the entry of the dismissal. We find that the dismissal was an involuntary dismissal pursuant to Tenn. R. Civ. P. 41.02. We review Rule 41.02 involuntary dismissals under the abuse of discretion standard. *See Mfrs. Consolidation Serv., Inc. v. Rodell*, 42 S.W.3d 846, 864 (Tenn. Ct. App. 2000) (“The trial court dismissed Turner's complaint pursuant to rule 41.02 of the Tennessee Rules of Civil Procedure [O]ur review of such decisions is governed by an abuse of discretion standard.”).

Tenn. R. Civ. P. 41.02 provides as follows:

Rule 41.02. Involuntary Dismissal – Effect Thereof.– (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(2) After the plaintiff, in an action tried by the court without a jury, has completed the presentation of plaintiff’s evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court shall reserve ruling until all parties alleging fault against any other party have presented their respective proof-in-chief. The court as trier of the facts may then determine them and render

² While this appeal was pending, Defendant filed a motion to dismiss the appeal arguing that the judgment was not a final appealable judgment pursuant to Tenn. R. App. P. 3 because the case was dismissed without prejudice. On September 18, 2008, this Court denied that motion as having no merit. In its brief on appeal, Defendant again argues that the judgment is not a final judgment. We adhere to our original decision on this issue and respectfully decline to address it a second time.

judgment against the plaintiff or may decline to render any judgment until the close of all the evidence; in the event judgment is rendered at the close of plaintiff's evidence, the court shall make findings of fact if requested in writing within three days after the announcement of the court's decision.

(3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule 41, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

It is clear from the Trial Court's judgment that it ordered Plaintiff to retain an attorney because she lacked the necessary medical proof to go to trial. The Trial Court determined that without legal assistance, if the case were to be tried on the scheduled date, Plaintiff's lawsuit would be dismissed with prejudice. In an effort to prevent this result, which the Trial Court evidently felt to be unfair, the Trial Court involuntarily dismissed this case without prejudice. The apparent basis for the dismissal was that Plaintiff had failed to comply with the Trial Court's order that she obtain counsel to assist her with prosecuting this case.

In *Lovin v. State*, 286 S.W.3d 275 (Tenn. 2009), our Supreme Court recently stated that:

As a general matter, clients should not be forced to entrust their legal matters to an unwanted lawyer. Accordingly, clients may discharge a retained lawyer whenever they cease to have absolute confidence in the lawyer's integrity, judgment, or professional competence. *Spofford v. Rose*, 145 Tenn. 583, 609, 237 S.W. 68, 76 (1922); *Chambliss, Bahner & Crawford v. Luther*, 531 S.W.2d 108, 110 (Tenn. Ct. App. 1975). As this Court noted over twenty-five years ago, a client may discharge a retained lawyer at any time, with or without cause. *Crawford v. Logan*, 656 S.W.2d 360, 364 (Tenn. 1983) (citing *Chambliss, Bahner & Crawford v. Luther*, 531 S.W.2d at 109).

Lovin, 286 S.W.3d at 285.³

Our primary problem with the Trial Court's decision is that it cannot prohibit a party from proceeding to trial pro se if that is what that party wants to do, even if that is an unwise decision. Plaintiff obviously had trouble retaining and keeping a lawyer as she was represented by two different lawyers at various times in this litigation, and both those attorneys were allowed to

³ While *Lovin* was a criminal case, we believe the portion of that opinion quoted above is equally applicable to civil cases, and we note that the three cases cited by the Supreme Court were all civil cases.

withdraw. The Trial Court's requirement that Plaintiff get a new attorney also overlooks the fact that Plaintiff may not be able to find an attorney to represent her even after a diligent search. It is unclear what the Trial Court would do if Plaintiff re-filed within one year but still was unable to secure the services of an attorney. This Court does not believe that litigants in civil cases who do not want or cannot find an attorney to represent them should have their cases involuntarily dismissed for exercising their right to proceed pro se, even if that dismissal is without prejudice.

In *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222 (Tenn. Ct. App. 2000), this Court observed that:

Pro se litigants are entitled to fair and equal treatment. See *Childs v. Duckworth*, 705 F.2d 915, 922 (7th Cir. 1983). *Pro se* litigants are not, however, entitled to shift the burden of litigating their case to the courts. See *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1194 (D.C. Cir. 1983). *Pro se* litigants are not excused from complying with the same substantive and procedural requirements that other represented parties must adhere to. See *Irvin v. City of Clarksville*, 767 S.W.2d 649, 652 (Tenn. Ct. App. 1988).

Whitaker, 32 S.W.3d at 227.

When the Trial Court involuntarily dismissed this lawsuit, it temporarily relieved Plaintiff from complying with the same substantive and procedural requirements that Defendant was required to observe. We understand that the Trial Court did what it did in an attempt to be fair to Plaintiff. However, it neglected to consider whether dismissing the case was unfair to Defendant as well as being against Plaintiff's wishes. This case originally was filed in January 2002 and was dismissed in May 2008. Thus, Plaintiff had over six years to do what was necessary to have her case ready for trial. In the meantime, during this six year period Defendant was paying its attorney fees and incurring costs necessary to defend this action. Defendant was on the brink of a trial on the merits, and the Trial Court, against Plaintiff's wishes, *sua sponte* dismissed the case without prejudice.

We conclude that the Trial Court's underlying order requiring Plaintiff to retain an attorney was in error. As a result, the Trial Court further erred when it involuntarily dismissed this lawsuit on the basis that Plaintiff failed to comply with its order. The judgment of the Trial Court involuntarily dismissing this lawsuit is vacated. This case is remanded to the Trial Court for reinstatement on its active docket and to set the case for trial.⁴

Conclusion

⁴ Even though we are requiring that this case be set for trial, we are not mandating that a trial take place if for some valid reason the case otherwise is dismissed or resolved. This would include, but not be limited to, a Rule 40.01 voluntary dismissal by Plaintiff or the grant of summary judgment to Defendant, assuming Defendant at some point files a properly supported motion for summary judgment.

The judgment of the Trial Court is vacated, and this cause is remanded to the Trial Court for further proceedings consistent with this Opinion and for collection of the costs below. Costs on appeal are taxed to the Appellee, CVS Corporation d/b/a CVS Pharmacy, Inc., for which execution may issue, if necessary.

D. MICHAEL SWINEY, JUDGE